

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

76 - 4038

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
V.
CONTAINAIR SYSTEMS CORPORATION,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT

KELLEY DRYE & WARREN
Attorneys for Respondent
350 Park Avenue
New York, New York 10022
212 - 752-5800

Of Counsel

Eugene T. D'Ablemont
John F. Gibbons
Diana B. Winston

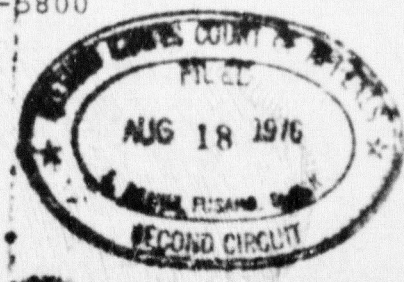


TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	4
Barth's Strike Misconduct	4
Barth's Mishandling of His Duties and Responsibilities as Shipping Clerk	8
The Application for Reinstatement	14
ARGUMENT	
There is Not Substantial Evidence on the Record as a Whole to Support The Board's Finding that Containair Violated Sections 8(a)(1) and (3) of the Act by Not Reinstating Striker, Richard Barth	18
A. Barth Committed Serious Acts of Strike Misconduct Justifying His Non-Reinstatement	18
B. Barth's Misconduct on the Job Before the Strike Warranted Denial of Reinstatement	26
C. Barth Never Made an Unconditional Offer to Return to Work	31
CONCLUSION	35

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Addison Shoe Corp.</u> , 151 NLRB 65 (1965)	30
<u>Aladdin Industries, Inc.</u> , 22 NLRB 1195 (1940), <u>enforced in part</u> , 125 F.2d 377 (7th Cir.), <u>cert. denied</u> , 316 U.S. 706 (1942)	19, 30
<u>Alcan Cable West, Div. Alcan Aluminum Corp.</u> , 214 NLRB No. 35 (1974)	24
<u>American Optical Co.</u> , 138 NLRB 681 (1962)	31
<u>American Tool Works Co.</u> , 116 NLRB 1681 (1956)	24, 25
<u>Claremont Polychemical Corp.</u> , 196 NLRB 613 (1972)	20
<u>Cohoon, S.D., & Son</u> , 101 NLRB 966 (1952)	34
<u>Containair Systems Corp. v. N.L.R.B.</u> , 521 F.2d 1166 (2d Cir. 1975)	3, 20
<u>Firestone Tire and Rubber Co.</u> , 187 NLRB 54 (1970)	24
<u>Fort Smith Broadcasting Co.</u> , 146 NLRB 759 (1964), <u>set aside on other grounds</u> , 341 F.2d 874 (8th Cir. 1965)	30
<u>Fox & Ginn Moving & Storage Co.</u> , 146 NLRB 707 (1964)	33, 34
<u>Grant, W.T., Co.</u> , 214 NLRB No. 96	28
<u>Kayser-Roth Hosiery Co.</u> , 187 NLRB 562 (1970), <u>enforced in part</u> , 447 F.2d 396 (6th Cir. 1971)	24

<u>Mackay Radio and Telegraph Co., 96 NLRB 740</u> (1951)	20
<u>National Packing Co. v. N.L.R.B., 377 F.2d 800</u> (10th Cir. 1967)	20
<u>N.L.R.B. v. Breitling d.b.a. Breitling Bros.</u> <u>Constr. Co., 378 F.2d 663 (10th Cir. 1967)</u>	30
<u>N.L.R.B. v. Fleetwood Trailer Co., 389 U.S.</u> 375 (1967)	19, 31
<u>N.L.R.B. v. Morris Fishman & Sons, Inc., 278 F.2d</u> 792 (3rd Cir. 1960), <u>enforcing</u> 122 NLRB 1436	24
<u>Oneita Knitting Mills, Inc. v. N.L.R.B., 375 F.2d</u> 385 (4th Cir. 1967)	24
<u>Ruscoe, W. J. Co. v. N.L.R.B., 406 F.2d 725</u> (6th Cir. 1969)	19, 24
<u>Sawyer Shoes, Inc., 190 NLRB 651 (1971)</u>	31, 32, 34
<u>Teamsters, Local 295 (Air Line Freight, Inc.),</u> NLRB Case No. 29-CC-387 (1974).	3
<u>Uniform Rental Service, Inc., 161 NLRB 187 (1966)</u>	30
<u>Universal Camera Corp. v. N.L.R.B., 340 U.S. 474</u> (1951)	18

Statute:

National Labor Relations Act, as amended (61 Stat.
136, 73 Stat. 519, 29 U.S.C. Sect. 151, et seq.)

Section 8(a) (1)	3, 4, 18
Section 8(a) (3)	3, 4, 18
Section 8(b) (1) (A)	2
Section 8(b) (4) (i)	2, 20
Section 8(b) (4) (ii) (B)	2, 20
Section 8(b) (7) (B)	20
Section 10(c)	19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-4038

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
V.
CONTAINAIR SYSTEMS CORPORATION,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The National Labor Relations Board ("Board") has petitioned for enforcement of its June 26, 1975 order (A. 22)* directing Containair Systems Corporation ("Containair") to offer reinstatement and pay lost wages to Richard Barth, a former

* Numerals preceded by "A." are references to page numbers of the Appendix to the parties' briefs.

employee of Containair, who engaged in serious acts of strike misconduct in February and March 1974, unsatisfactorily performed his job duties before the strike and never made an individual, unconditional offer to return to work at the end of the strike. The Board adopted without opinion the Decision and Order of Administrative Law Judge Sidney J. Barban issued February 13, 1975 (A. 2-21).

This controversy arises out of a strike Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 295" or the "Union"), a union notorious for its disregard of both employees' and employers' rights, called between February 22 and mid-March, 1974, to gain recognition rights over employees of Containair. From the outset, violence, threats and secondary boycott activity marked Local 295's and Barth's strike activity.

As a result of charges that Containair filed against Local 295 on February 25, 1974 (A. 24, 25), the Board's Regional Director of Region 29, on March 6, 1974, issued a consolidated complaint against the Union alleging violations of Sections 8(b)(1)(A) and 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act ("Act") (A. 26-32). On March 7, 1974 the Board proposed a settlement stipulation to which the Union readily agreed on March 12, 1974 (A. 40-45). On March 18, 1974 Containair opposed the proposed stipulation's failure to require the Union, a recidivist violator of the Act, to admit

guilt, but the Board dismissed Containair's objections and approved the stipulation in its order of July 16, 1974 (A. 51-58). On August 16, 1974 Containair petitioned this Court for review of that order. On June 18, 1975 this Court denied Containair's petition and enforced the Board's order. Containair Systems Corp. v. N.L.R.B., 521 F.2d 1166 (2d Cir. 1975). In its decision the Court noted that Local 295's illegal secondary boycott activities seemed to violate the terms of an order issued by the Board against Local 295 (Air Line Freight, Inc.), NLRB Case No. 29-CC-387 (1974), proscribing such unlawful conduct and questioned why the Board failed to prosecute Local 295 for contempt of the injunction in that case.

Local 295 ended its terror tactics and strike on March 14, 1974 (A. 17, 74, 165). Following the end of the strike Containair did not reinstate a number of the striking employees, either because they had been permanently replaced, had engaged in serious strike misconduct or did not make an unconditional request to return to work. On March 20, 1974 the Union filed an unfair labor practice charge alleging that Containair terminated some 23 strikers, including Richard Barth, in violation of Section 8(a)(1) and (3) of the Act and engaged in other activities in violation of the Act. The Regional Director of Region 29, in a letter dated June 28, 1974, notified the Union that his investigation had failed to establish that Containair acted unlawfully with respect to 22 of the 23 strikers or that

Containair unlawfully refused to bargain or engaged in activity that would destroy the possibility of a fair election (A. 48-51). Subsequently, on July 3, 1974, the Regional Director issued a complaint alleging Containair had violated Sections 8(a) (1) and (3) of the Act only by refusing to reinstate Richard Barth, an active participant in illegal strike activity between February 22 and March 14, 1974 (A. 2, 74, 95-98).

STATEMENT OF THE FACTS

Containair Systems Corporation is a small company located in Springfield Gardens, New York, which manufactures, sells and distributes collapsible, pilfer-proof containairs* and related products that airlines, freight forwarders and trucking and independent companies use to ship cargo. Prompt delivery of merchandise is absolutely essential to Containair's customers and to the carton-using industry in general (A. 134, 135, 166, 167).

Barth's Strike Misconduct

On February 22, 1974 the Union called a strike of Containair's employees and set up picket lines outside Containair's premises in an effort to force the Company to recognize and bargain with it without a Board election. Some employees participated in the strike out of fear of bodily harm from the Union; others, even though threatened with personal injury,

* Containair's unique container is called a "containair".

refused to join the strike and Containair continued to operate its business (A. 26-32, 48-49, 73-74).

Right from the start, the strike teemed with deliberate acts of property damage against Containair and threats to the bodies and lives of Containair's employees and of employees of customers of Containair, such as Emery Air Freight ("Emery"), that the police had to stop on numerous occasions. These acts and threats, as the Regional Director specifically found in his complaint in Cases Nos. 29-CB-1729 and 29-CC-401 (A. 26-32), were committed by officials of Local 295 and by picketing employees of Containair acting under the direction and control of the Union. Part of this reign of terror against Containair included the crudest and most effective form of secondary boycott. The secondary boycott, threats and acts of property damage continued on an almost daily basis from February 22 until March 14, with pickets stopping pick-up from and delivery to Containair by physically blocking ingress to Containair's premises and by orally warning drivers not to cross the picket line, and by attempting to block egress of Containair trucks (A. 26-32, 48-50, 73-74, 78-80, 94-98, 101, 148-151, 152-153).

Richard Barth was at the hub of all this lawless conduct. He was present consistently both at Containair and Emery when these misdeeds occurred and never once disavowed any of them. Moreover, Barth actively participated in making the

secondary boycott activity against Containair effective and tremendously damaging to its business. For example, on February 25 and 26, 1974, Containair's Vice-President and General Manager, George Estrada, and a non-striking employee, Robert Gregorio, drove to Emery to try to make a delivery. Barth followed them in his automobile on each occasion. By his own admission, he "wanted to see if they would take containairs at Emery" and certainly the presence of Barth fortified the unlawful threats to Emery employees not to handle Containair's products and thus insured that Emery employees would not unload Containair's truck (A. 95-98, 148-149).

Furthermore, Barth vigorously took part in trying to block access to Containair's premises with his automobile. One morning in early March, Barth drove his automobile in front of Containair's main driveway so as to block a truck from entering. While he was there, three trucks arrived at the front entrance. With regard to the first two trucks, Barth got out of his car and walked up to the truck drivers. After talking to them for five to ten minutes, the drivers pulled away. The driver of the third truck came into Containair's office, said he could not make a delivery and asked if he could use a telephone to call his office. After making the telephone call, he left without making any delivery (A. 149-150).

A few days later, Barth again parked his car so as to partially block Containair's front driveway thereby making an-

other vehicle's entry into the driveway impossible. Two trucks pulled up and after Barth spoke to the drivers, they left. Later a truck hauling lumber for Woodex Lumber Corporation arrived. The driver came into the office and told Estrada he had a shipment to deliver. Estrada went inside the plant to get Joe Velk, Manager of Containair's Cargo Packing Division, to unload the truck. Estrada then went outside and asked Barth to please take his automobile out of the driveway because a shipment had to be unloaded. Barth backed up a little bit, leaving just enough room for the truck to enter the driveway. However, because of the length of the lumber, the truck had to be unloaded in the middle of the street. As the truck positioned itself for unloading, Barth drove about 200 feet away from the truck where he picked up two other men, turned his automobile around, drove back toward the truck and parked between the truck and another car that was parked at the curb near the truck, thereby physically blocking the truck from moving and preventing Velk from unloading the truck. Estrada went up to Barth and asked him to please move his car because it was blocking the street. Barth became excited and abusive. Estrada asked Barth several more times to move his car but he persistently refused. Estrada finally told Barth he was going to call the police and walked into the office. When Estrada later looked outside, Barth had driven away. Barth's blockade, removed only by the threat of police intervention, interrupted

the unloading process for about 20 to 25 minutes (A. 150-151, 152-153).

Barth's Mishandling of His Duties
and Responsibilities as Shipping Clerk

As Shipping Clerk, Richard Barth played an important role in Containair's operations. He bore full responsibility for (i) making out bills of lading from packing lists, which entails writing the address, the name of the carrier, the type of goods involved and the date the goods are ready for shipment, (ii) calling carriers to expedite shipment, (iii) loading trucks, (iv) giving carriers the second copy of the bill of lading together with the packing list, (v) bringing the first and third copies of the signed bill of lading into the Order and Billing Clerk to let her know that the shipment has gone out so that she can bill the customer that day or the next and (vi) retaining the fourth copy of the bill of lading in his office. Unquestionably, the manner in which Barth carried out these responsibilities had a vital effect on the success or failure of Containair's business (A. 72, 77, 89-90, 98, 108-110, 120, 126, 142-143).

Containair did not uncover any major problems as a result of Barth's performance as Shipping Clerk until about a week before the strike commenced. At that time Estrada received several telephone calls from customers complaining that they had not received their goods. He attempted to track down

the orders and in the process asked Barth about their status. Barth went through the papers on his desk and told Estrada that he had no paper work on them, so the merchandise must have been shipped. Estrada took Barth at his word and continued his search, but was unable to find any paper work on those orders. Accordingly, Estrada could not determine whether or not the goods had been shipped to the customers as promised (A. 135-136, 153-155).

On or about February 26, 1974, four days after the strike began, Bess Mandell, Containair's Bookkeeper and Office Manager, called to the attention of Mary Saidens, the Order and Billing Clerk, that the number of green copies of the invoices on Mrs. Saidens' desk was greater than usual since production was then up to schedule.* Mrs. Saidens agreed and asked Estrada if there were any bills of lading for goods that had already been shipped but had not been billed (A. 110, 121-122).

Estrada then checked the plant and found on top of Barth's desk several bills of lading that had been ready for

* Containair was able to maintain its production schedule even though the strike was then in progress. Its pre-strike production had been excellent. As a result, it had very few D containairs to produce and about a third of its total employee complement was at work during the first week of the strike. Furthermore, Containair had to lay off some men before the strike began because the volume of its business had slackened and, in fact, if the strike had not occurred, it would have begun using employees to rearrange the plant, rather than for production (A. 48-49, 159).

shipment for some time but had never been shipped to the customers. One of these bills of lading (A. 61) showed that an order for General Electric had been ready for shipment since February 8, 1974, but had not been shipped. Two other bills of lading (A. 62, 63) showed that orders for Hodes Daniel and Wilson Air Freight had been ready for shipment since February 19, 1974, but they too had not been shipped. In each instance, Richard Barth was the person responsible for seeing that the goods were promptly shipped once they were ready for shipment. Indeed, each of the bills of lading bore Barth's initials preceded by the words "Shipper, Per". Estrada also found some yellow copies of invoices that Barth had received on February 20 or 21 and for which Barth did not write out bills of lading.* Estrada brought the bills of lading into the office and each of the orders was processed for shipment either that day or the next (A. 60, 62, 64, 111-117, 120-121, 130-132, 136-137).

On February 28, 1974, John Becker, Containair's Vice President in charge of marketing and sales, delivered an important order to Burroughs Corporation in Piscataway, New Jersey, that Containair had promised to deliver by February 22 or 23, 1974. At Burroughs, Becker was informed that Containair had already delivered the order and called Estrada to re-

* Since the Hodes Daniel and Wilson Air Freight orders were ready for shipment on February 19, Barth had plenty of time to process them before the strike began (A. 161).

port the double shipment. Estrada immediately went into the main office and with Bess Mandell checked to see if there was a bill of lading indicating that the Company had shipped the order. They found none. Estrada then checked the bill of lading machine where he found the machine copy of the Burroughs' bill of lading (A. 68) bearing Barth's initials preceded by the words "Shipper, Per" and showing that the order had been shipped on February 21, 1974. Estrada did not find any copies of the Burroughs' invoice or the first and third copies of the signed bill of lading on top of Barth's desk as it should have been if he truly did not have time to take them to the office because of the start of the strike. Furthermore, when Becker returned, Mary Saidens wrote "DOUBLE ORDER" on the copy of the invoice he had taken with him to Burroughs (A. 67-68, 137-145).

That same week and continuing into the first week of March 1974, Containair received numerous complaints from customers about their failure to receive merchandise by the promised delivery date. The number of such complaints was highly unusual because the Company's production had been up to schedule throughout this entire period. In fact, a short inventory Containair completed during the first week of March disclosed that the Company had more goods on the floor than it should have had (A. 111, 116-117, 122-125, 127-128, 145, 161-162).

As a result of these complaints, Estrada checked to see if the orders were sent out. He went through the green

copies on Mary Saidens' desk and found that the green copies for those orders were still there. This meant that Containair had not shipped the goods to those customers. Estrada then went to the back of the plant to see if he could find any bills of lading on those orders. He found none. Realizing that something was drastically wrong, Estrada immediately conducted a thorough search of Barth's office, which uncovered 15 to 20 bills of lading and packing lists, collectively worth several thousand dollars. Estrada found most of these documents buried under and between papers in Barth's desk drawers. From these bills of lading and packing lists, Estrada discovered that Barth had shipped some merchandise without bills of lading and, more important, without notifying the office of shipment so that the Company could bill the customers, and that some orders had been ready for shipment but Barth had failed to ship them in a timely and proper manner. Estrada took the documents into the main office where he told Joe Velk, Bess Mandell, Mary Saidens and Kenny Pergolis, Containair's Secretary, what he had just found. Estrada directed that each document be examined to determine what was shipped and what was not shipped and what was billed and what was not billed. The office staff performed that task under Mrs. Mandell's supervision. Thereafter, the office staff prepared new bills of lading for some of the orders because the bills Estrada found were too old; Estrada made sure that the unshipped orders were sent out, and Mary Saidens billed the customers who received these orders, as well as the customers who

had received shipments that Barth never reported to the office (A. 117-118, 145-148, 162-163, 168-169).

Furthermore, on March 5, 1974, Containair received a telephone call from Stephen Gould of Massachusetts complaining that it had received a damaged containair. Bess Mandell and Mary Saidens checked the Company's records and could find no record of shipment. They told this to the customer who reiterated that a damaged containair had in fact been received. They then examined the open order file and found that the white copy of the invoice was there, which indicated that Containair had neither shipped the order nor billed the customer. They also found the green copy of the invoice, which confirmed that the Company had neither shipped the merchandise nor billed Gould, but indicated that the office had not even received a bill of lading from the Shipping Clerk. They even looked through the number 4 copies of the bills of lading but found no bill of lading for the Gould shipment. They informed the customer of what they had found but he still insisted that Gould had received the containair. Mrs. Mandell therefore instructed Mrs. Saidens to invoice the Gould shipment with the notation "MDSE RECEIVED - NO BILL OF LADING GIVEN OR FOUND", which Mrs. Saiden did. The Board, in dismissing Containair's evidence on the incident as lacking detail, ignored the overwhelming evidence that Barth shipped the Gould order with a bill of lading and had failed to report the shipment to the office for billing (A. 10, 66, 117-119, 174-175).

The Applications for Reinstatement

At about 8:00 A.M. on March 14, 1974, a group of at least six striking employees, including Richard Barth, Norman Davis, Al Williams, Booker Huggins, Claude Phipps and Lonnie Gentry, walked into Containair's main office and met with George Estrada.* Al Williams served as the group's spokesman and asked for the employees specific jobs back together as a group. Only Lonnie Gentry made a statement about returning on an individual basis. "He just said he wanted his job back, if he had a job." Estrada said he had to call his lawyer and told them to wait outside until 10:00 A.M. The group then left. Neither Barth, Huggins, Phipps nor Davis said anything at all during this meeting (A. 74-75, 80-85, 101-103).

A group comprised at least of Richard Barth, Al Williams, Claude Phipps, Lonnie Gentry and Norman Davis re-

* Barth's testimony as to the time, participants and substance of this meeting is thoroughly inconsistent. On direct examination, he testified that the meeting began at 9:00 A.M. (A. 75) but on cross-examination he changed the time to 8:00 A.M. (A. 80, 82). He also testified on direct examination that in addition to the six employees list above, Eddie Williams attended the meeting (A. 75). On cross-examination, however, Barth omitted Eddie Williams as a participant and when confronted with his prior affidavit was compelled to admit that he had erred in his testimony by failing to mention that Eddie Lunsford also attended the meeting (A. 80, 82-84). Finally, on cross-examination, Barth confused the first meeting on March 14 with the meeting of March 15 (A. 80).

turned to the plant at 10:00 A.M.* One of the group, probably Al Williams, asked Estrada if they had their jobs. Estrada replied that he had not yet gotten in contact with his lawyer and that he needed some more time. He therefore told them to go home and call back after working hours. With that, the group left (A. 75, 84-86, 103).

At 4:30 P.M. that afternoon, Barth telephoned Estrada and asked him if he heard anything. Estrada told him to come to the plant the following morning (A. 75, 84-86, 165).**

Also on March 14, Local 295 sent Containair a telegram erroneously stating that 23 employees named in the telegram, including Barth, had "asked to return to work 3/14/74 at 9:00 A.M." and "[t]hey were refused entrance to the premises" (A. 37).

The next day, March 15, Barth went by himself to Containair at 8:00 A.M. He waited at the side door with Al Williams, Claude Phipps, Norman Davis and Booker Huggins until Estrada called Barth in to meet alone with Containair's

* Barth's recollection of this meeting conflicts with that of Norman Davis who testified on behalf of the General Counsel. Barth testified that he accompanied only Williams, Phipps and Gentry to this meeting (A. 85) while Davis testified that the group not only included himself but everybody who attended the earlier meeting that day (A. 103).

** Barth's testimony on this conversation was also marred by inconsistency. After testifying about the telephone call on direct, Barth completely forgot about it on cross and then when he remembered it, he recounted a different version of what was said (Compare A. 75 with A. 84-86).

President, Julius B. Kupersmit, Becker and him. Estrada told Barth that he could not put him back to work at that time because they were investigating a few incidents involving him and that he would be informed of the outcome of the investigation.* Although Estrada did not specify what those incidents were, he had in mind various incidents of strike misconduct and the evidence of Barth's mishandling of his Shipping Clerk responsibilities which was uncovered during the strike. Barth said okay and left (A. 75, 86-88, 90, 151-152, 165).

That same morning Containair put Al Williams, the employee leader of Local 295's organizational drive, an active picket and the group's spokesman, and Norman Davis and Booker Huggins, both active pickets, back to work. It also told Claude Phipps, another active picket, that the Company was placing him on a preferential hiring list because he had already been permanently replaced (A. 48-50, 75, 79, 87).

Later that day, Containair's counsel sent a registered letter (A. 38-39) to Local 295, pointing out how totally wrong the Union's facts were. Counsel advised Local 295 that

* Barth testified that Estrada told him that Containair had charges against him, so that he would have to wait until the hearing comes up (A. 76, 87). Quite aside from the fact that Estrada flatly, categorically and emphatically refuted this (A. 151-152, 165), Barth's statement makes no sense at all. In these circumstances, the fact that Barth concededly did not ask Estrada what he meant by "charges" or "a hearing" points up that Estrada never made the statement Barth attributes to him (A. 87).

in the event the Union wished Containair to construe its telegram of March 14 as an unconditional offer to return to work on behalf of the 23 listed employees (which it did not purport to be), Containair was willing to accept back at work all employees except those who have been permanently replaced, whom the Company will place on a preferential hiring list, or those who have committed acts of misconduct justifying Containair in denying them reinstatement and instructed Local 295 to "[h]ave employees [including Barth] report to Containair at the start of business on Monday March 18 when each will be told of his individual job status."

Richard Barth neither reported to Containair on Monday March 18 nor since March 15 has he ever contacted the Company or any of its representatives. In early April 1974, Containair permanently replaced Barth (A. 76, 164, 167).

Additional facts appear in the Argument.

ARGUMENT

THERE IS NOT SUBSTANTIAL EVIDENCE
ON THE RECORD AS A WHOLE TO SUPPORT
THE BOARD'S FINDING THAT CONTAINAIR
VIOLATED SECTIONS 8(a)(1) and (3)
OF THE ACT BY NOT REINSTATING STRIKER,
RICHARD BARTH

In Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), the Court held that, when a Court of Appeals reviews an act of the Board, the Board is held to the following standard of proof: Whether on the record as a whole there is substantial evidence to support the Board's findings. In this case a review of the record unequivocally demonstrates that there is not substantial evidence to support the Board's finding that Containair violated Sections 8(a)(1) and (3) of the Act by not reinstating Richard Barth. Indeed, the record is replete with compelling evidence that Containair had no obligation to reinstate Richard Barth following his participation in the strike that ended March 14, 1974, as he engaged in serious acts of strike misconduct, he unsatisfactorily performed his job duties prior to the strike and never made an unconditional offer to return to work following the strike.

A. Barth Committed Serious Acts
of Strike Misconduct Justi-
fying His Non-Reinstatement

It is well settled that an employer has no obligation to reinstate an economic striker where the employer has

"legitimate and substantial business justifications" therefor, such as the employee's serious strike misconduct or poor work performance. See, e.g., N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); W. J. Ruscoe Co. v. N.L.R.B., 406 F.2d 725 (6th Cir. 1969); Aladdin Industries, Inc., 22 NLRB 1195 (1940), enforced in part, 125 F.2d 377 (7th Cir.), cert denied, 316 U.S. 706 (1942); Act §10(c), 29 U.S.C. §160(c).

With respect to Barth's strike activities, the Board concluded that they did not "rise to the level of misconduct which would disqualify him from reinstatement" (A. 16). More specifically, it dismissed Barth's misdeeds at Emery and Containair, except for the Woodex incident which it discounted as "a single incident of impulsive minor misconduct" (A. 16). This conclusion is clearly without support in the record.

Overwhelming credible evidence in this case shows that Richard Barth was a central character in the three-week strike at Containair that was punctuated by threats to the lives and bodies of Containair employees and of employees of Containair's customers, by deliberate acts of property damage and by harmful secondary boycott activity.

There is no doubt that Local 295 and its striking members at Containair engaged in an unlawful secondary boycott involving Containair's customer, Emery Air Freight, in violation of Sections 8(b)(4)(i) and (ii)(B) of the Act (A. 26-32, 148-

149). The Board does not dispute this fact (Board's Brief, at 16) which this Court recognized in Containair Systems Corporation v. N.L.R.B., supra, at 1174, note 4.

The law is clear that an employee, who, like Richard Barth, participates in an unlawful strike, may not invoke the protection of the Act to obtain reinstatement. National Packing Co. v. N.L.R.B., 377 F.2d 800 (10th Cir. 1967); Claremont Polychemical Corp., 196 NLRB 613 (1972); MacKay Radio & Telegraph Co., 96 NLRB 740 (1951). In National Packing and Claremont, employees, who had participated in strikes in violation of Section 8(b)(7)(B) of the Act,* were held not entitled to reinstatement. In MacKay, the Board refused to order reinstatement of employees who engaged in conduct the Board would have found to be violative of Section 8(b)(2) of the Act** if it had been presented with the issue. The Board decided it had no license to overlook such conduct and held it could not encourage, through its remedial processes, conduct subversive of the statute. 96 NLRB at 743. Barth's active role in insuring the success of the secondary boycott against Containair certainly is conduct subversive of the Act. Barth personally followed Containair's truck to Emery Air Freight on at least two occasions for the obvious purpose of assuring the effectiveness of the secondary

* Section 8(b)(7)(B) proscribes recognition picketing within 12 months of a valid Board election.

** Section 8(b)(2) proscribes a union or its agents causing or attempting to cause an employer to discriminate against an employee in a manner the Act forbids.

boycott. Barth's account of the Emery incidents shows his complete lack of candor and obvious desire to hide what really happened at Emery. The following excerpt from Barth's cross-examination bears this out:

"Q. You watched the truck to see what they were doing, so you saw the truck leave the plant?

You saw the truck leave Container's plant?

"A. Yes.

* * *

"Q. Then you went out to Emery?

"A. I just went out there.

"Q. You went --

"A. I didn't know they were going there, I just happened to go there.

"Q. You just happened to go there?

"A. Right, I was going there and the truck came in.

"Q. Why were you going out to Emery?

"A. I wanted to.

"Q. To do what?

"A. I don't know, I just wanted to see. I didn't know the truck was going there, but it happened to go there.

"Q. Why were you going to Emery? What was your purpose for going to Emery?

"A. I wanted to see what they do.

"Q. To see what Emery does?

"A. Yes.

"Q. Coincidentally the same time one of our trucks happened to go to Emery?

"A. Right.

* * *

"Q. Well, what was it that you wanted to see out at Emery in the first place? That is what I'm a little confused about.

"A. I wanted to see if they would take containairs at Emery" (emphasis added) (A. 95-96).

The fact that Containair produces, solely for Emery, containairs with a distinctive blue border, which Barth undoubtedly saw when the truck was loaded and left for Emery, belies his testimony that he did not know Containair's truck was going to Emery (A. 135).

Barth's contention that he was going to Emery solely out of idle curiosity is equally incredible. Although he may not actually have spoken to anyone at Emery, his presence close on the trail of Containair's truck served as silent, but nonetheless effective proof to Emery employees of the seriousness of the threats they had received not to handle Containair products. Barth's presence thereby helped to ensure that the Company's truck would not be unloaded.

There is no question but that Barth also engaged in serious misconduct on the picket line at Containair. He used his automobile to block trucks from gaining entry to Contain-

air's premises -- no less than six times (A. 149-150). In fact, with regard to the incident involving a Woodex Lumber truck, Barth pushed hard for a confrontation when, after initially moving his car to permit the truck to pull into Containair's driveway, he picked up two other men, repositioned his car so as to totally interfere with any attempts to unload the truck and then persistently and abusively rejected Estrada's courteous pleas to move so that the truck could be unloaded. Barth relented about 25 minutes later but only after Estrada informed him that he was going into the plant to exercise the only peaceful alternative he had -- to telephone for police assistance (A. 150-151).

Furthermore, it is highly significant that Richard Barth was on the scene at Containair and Emery when the bulk of the contemptible acts occurred and at no time did he ever disavow or disassociate himself from those misdeeds.

Barth's own testimony regarding his strike activities vividly points up his lies. For example, according to Barth he did not stop any trucks during the strike. The trucks simply stopped when they saw Barth and his fellow pickets. When this occurred Barth did not approach any trucks unless drivers called him over and then in conversations with the drivers, Barth merely told them, "If they wanted to cross, they can cross". This happened on three occasions (A. 90-94). Not only did Estrada directly and forthrightly contradict Barth's testimony

(A. 150-151, 152-153), but in view of the fact that this was a three-week strike conducted in a highly charged atmosphere in which Barth admittedly picketed every day, except weekends, Estrada's testimony is more convincing.

All of the foregoing compels the conclusion that Barth's strike activities alone were serious enough to preclude his reinstatement. W. J. Ruscoe Co. v. N.L.R.B., *supra*; N.L.R.B. v. Morris Fishman & Sons, Inc., 278 F.2d 792 (3rd Cir. 1960), enforcing 122 NLRB 1436 (1959); Kayser-Roth Hosiery Co., 187 NLRB 562, 570 (1970) (Sandra Bishop), enforced in part, 447 F.2d 396 (6th Cir. 1971); American Tool Works Co., 116 NLRB 1681 (1956). See Oneita Knitting Mills, Inc. v. N.L.R.B., 375 F.2d 385, 391 (4th Cir. 1967) where, in upholding the company's refusal to reinstate an employee who provided transportation for other employees who threw eggs at the moving automobile of a non-striker, the Court stated: "Proof of West's misconduct need not be predicted on the fact that she actually threw the eggs, for in furnishing transportation for those who did she is equally culpable."; Firestone Tire and Rubber Co., 187 NLRB 54, 55 (1970) where the Board sustained Firestone's denying reinstatement to an employee (Richard Broussard) who was present during a conversation in which another employee, speaking for himself and other employees as "we", threatened the president of a company whose drivers crossed the picket line at Firestone's plant, because Broussard did nothing to disasso-

ciate himself from the other employee's remarks, and Alcan Cable West, Div. Alcan Aluminum Corp., 214 NLRB No. 35 (1974) (J. Martin).

In American Tool Works Co., supra, an employee named Hudson engaged in blockade tactics similar to those Richard Barth employed. When a junk truck arrived at American's plant for a load of scrap, Hudson stepped in front of the truck and prevented its entry through the plant gate while another picket went around to the side of the truck and engaged the driver in conversation. The driver then phoned his employer and drove away without attempting to enter the plant. Unlike Barth's stoppages which lasted 10 to 25 minutes, Hudson's sole interference lasted only a minute or two. Finding that Hudson's misconduct warranted American's refusing to reinstate him, the Trial Examiner stated in language especially apt in this case:

"We can consider Hudson's act per se. Such acts do not constitute peaceful persuasion; they are not within the exercise of the right of free speech. To block ingress is to attempt to prevent an entrance, forcibly compelling one who wants to enter to go no further or to commit an assault. The attempt, successful or not, is an unprotected act, and the employer may lawfully terminate the employment of one who made such attempt." 116 NLRB at 1701-1702.

On review, the Board approved of the Trial Examiner's finding, saying:

"The record permits of no other interpretation, we believe, than that by placing himself before the truck, in the plant gate, Hudson physically and forcibly blocked entrance

to the plant for the period necessary to dissuade the driver of the truck from entering. Unlike our dissenting colleague, we cannot regard such an act as divorced from all implication of a threat of physical violence. And such an implication is obviously not negated or lessened merely by virtue of the fact that the driver elected not to test the apparent threat by attempting to enter, but was soon dissuaded and turned away." Id at 1682.

Barth's blockade tactics, for which he enlisted the aid of two other men, provide even greater justification for denying him reinstatement and, standing alone, conclusively prove that the Board erred in ordering Barth's reinstatement.

B. Barth's Misconduct on the Job
Before the Strike Warranted
Denial of Reinstatement

The Board also erred when it failed to hold that Barth forfeited his right to reinstatement by deliberately or negligently performing his duties and responsibilities as Shipping Clerk. Instead, the Board improperly held that Containair's reliance on this misconduct "is an afterthought advanced to support the decision originally made on the basis of Barth's conduct during the strike" (A. 15-16), grounding this holding on an obvious misreading of the record. It incorrectly concluded that Containair was concerned merely with Barth's job-related misconduct based on Estrada's testimony that "although he did not inform Barth, the incidents he was referring to [in the March 15 meeting] were those concerning which he had previously testified, 'particularly some of the problems we had had

with the customers and the bills of lading, the mixup'" (A. 12). Prior to making that statement (A. 152), Estrada had testified about Barth's strike misconduct as well as his mishandling the shipping clerk job (A. 135-151). Moreover, Estrada's use of the word "particularly" clearly indicates that Barth's misconduct on the job was not Containair's sole consideration in determining whether or not to reinstate him. It certainly was not a pretext or an afterthought.

Furthermore, the Board's conclusion flies in the face of the hard evidence. During the strike, Containair discovered that Barth had shipped goods without bills of lading, or with a bill of lading but without bringing a copy of the bill of lading to the Order and Billing Clerk. This prevented Containair from billing its customers for the shipments and in at least one instance caused a duplicate shipment.

Even more important, Containair also discovered during the strike that Barth had buried several thousand dollars worth of bills of lading and packing slips in his desk. These documents concerned orders for Containair products that had been ready for shipment for some time but which Barth had failed to ship out. Containair also found on top of Barth's desk several other bills of lading for orders that also had been ready for shipment but which Barth neglected to take care of. In fact, one of the orders had been awaiting shipment for more than two weeks.

Barth's disclaimers with regard to these matters, which the Administrative Law Judge credited (A. 11), are entitled to no more weight than his other unbelievable and unconvincing testimony. Bess Mandell and George Estrada both credibly testified that the problems described above actually occurred and that the responsibility for them squarely falls on Richard Barth. Indeed, Containair's production of several of the bills of lading with Barth's own initials on them, as well as some of the other documents involved, not only fortifies the testimony of Mandell and Estrada but leaves no doubt as to where the truth really lies. Moreover, the fact that Containair never warned or reprimanded Barth about his work is irrelevant since Containair did not discover Barth's serious dereliction of duties and responsibilities as Shipping Clerk until after the strike began and thus had no reason to do so before then. Accordingly, the clear preponderance of all the relevant evidence required the Board to discredit Barth's testimony and overturn the Judge's credibility finding. See W. T. Grant Co., 214 NLRB No. 96 (1974).

Nor can there be any doubt that Containair should not and did not excuse Barth's misconduct. As a result of Barth's totally unsatisfactory job performance, Containair received numerous telephone calls from customers complaining that they had not received their goods by the promised delivery date. This caused Containair great concern because its business depends

heavily on its ability to provide prompt delivery to its customers. The testimony of George Estrada brings home the impact of the situation:

"Q. To what extent, if at all, is prompt delivery of merchandise important to Containair's business?

* * *

"A. I believe its one of the most important functions.

Generally speaking, and particularly with the airlines, their freight-handling system demands immediate attention.

So we have to make deliveries almost as soon as the orders are placed." (A. 135).

He further testified on this point as follows:

"Q. Are you aware that air cargo companies and other freight forwarders, by law, are under a duty to provide delivery within given times?

"A. Yes, sir.

"Q. Would you please tell the Judge under what law, if any, your company has to provide a product to your customers?

"A. Very simply.

* * *

"A. The law of survival.

If we don't they're going to get it elsewhere.

"Q. In other words, there's only a business reason, there is no Federal requirement or state requirement?

"A. None whatsoever.

It's all strictly economic" (emphasis added). (A. 167).

Inasmuch as the Shipping Clerk bears vital responsibility for seeing that orders are promptly sent out to customers once they are ready for shipment and for taking copies of signed bills of lading into the main office so that Containair may bill the customers, Containair must demand a high level of performance from the person who fills the position. Estrada succinctly put it as follows:

"THE WITNESS: Your honor, a shipping clerk is a very important part of any organization.

This man can make you or break you."
(emphasis added) (A. 143).

Accordingly, since Barth's performance plainly demonstrates that he was unsuitable and unworthy of continuing to perform as Containair's Shipping Clerk, he was not entitled to reinstatement. Aladdin Industries, Inc., supra; cf. N.L.R.B. v. Breitling d.b.a. Breitling Bros. Constr. Co., 378 F.2d 663 (10th Cir. 1967); Addison Shoe Corp., 151 NLRB 65 (1965); Uniform Rental Service, Inc., 161 NLRB 187 (1966); Fort Smith Broadcasting Co., 146 NLRB 759 (1964), set aside on other grounds, 341 F.2d 874 (8th Cir. 1965).

C. Barth Never Made An Unconditional Offer to Return to Work.

Even if Barth's serious strike and job-related misconduct did not disqualify him from reinstatement (which the hard evidence plainly shows it did), the law is clear that Barth still would not be entitled to reinstatement unless he unconditionally applied to Containair for reinstatement before he was permanently replaced in early April. See, e.g., N.L.R.B. v. Fleetwood Trailer Co., supra; Sawyer Shoes, Inc., 190 NLRB 651 (1971); American Optical Co., 138 NLRB 681 (1962).

The uncontroverted evidence conclusively proves that the Board erred in not holding that Containair never received an individual, unconditional application to reinstate Barth before permanently replacing him. Speaking at the 8:00 A.M. meeting on March 14 on behalf of a group consisting of Barth, Norman Davis, Booker Huggins, Claude Phipps, Lonnie Gentry and himself, Al Williams requested Containair to return all of those employees as a group to the specific jobs they had held prior to the strike. Barth's testimony clearly proves this:

"Q. Who said what to whom on that occasion?

"A. Al Williams asked George Estrada if we could have our jobs.

"Q. Were those Al Williams' exact words?

"A. He asked for all of us, could we all have our jobs back...

* * *

"Q. Did Al Williams ask for everybody's job together as a group?

"A. Yes, he did" (A. 82).

This request was legally insufficient since it sought the reinstatement of all of the employees as a group and Containair was not obliged at that time to take back all members of that group, as the Regional Director so found in dismissing the charge in this case with respect to 22 of the 23 employees on whose behalf the Union filed it, including, specifically, Claude Phipps and Lonnie Gentry (A. 48-49).

At the 10:00 A.M. meeting on March 14, one of the group asked if they had their jobs. Since this did not materially differ from the earlier request, it too was not unconditional and thus, was legally insufficient.

At 4:30 P.M. that afternoon, Barth telephoned Estrada and merely asked if he had heard anything yet.* Clearly this remark cannot even be considered as an application for rein-

* The Board erroneously found that "it was understood that employees would call individually from their homes" (A. 12). In addition to the fact that this is contrary to Estrada's uncontradicted testimony that he told the employees as a group to call back (A. 165), such an understanding cannot change the status of any applications made on Barth's behalf from conditional to unconditional. Cf. Sawyer Shoes, Inc., supra.

statement.* And even if it were, the application did no more than reiterate the earlier conditional request.

Similarly, the Union's telegram of March 14 (A. 37) cannot be regarded as an unconditional application for reinstatement. In fact, it did not even purport to be an application. All it did was erroneously state that certain named employees, including Barth, had "asked to return to work 3/14/74 at 9:00 A.M." and "they were refused entrance to the premises."

It is undisputed that after March 14 and prior to Barth's being permanently replaced, nobody sought Barth's reinstatement. Although he met with Containair officials on March 15, Barth only said "okay" when George Estrada said that the Company was still reviewing his conduct to determine whether or not it had an obligation to reinstate him and that it would inform him of the determination. Moreover, the mere fact that Containair officials interviewed and considered Barth and other members of the group individually cannot convert the prior conditional applications to unconditional ones. As the Board itself admits, Containair initiated the offers to the two employees in the March 14 group who were reinstated (Board's Brief, page 8). Their acceptance of Containair's offer of reinstatement

* Barth's telephone request was identical in substance to the inquiry made by employee Sidney Aimes in Fox and Ginn Moving & Storage Co., 146 NLRB 707, 712 (1964), who called the Company's terminal manager to ask if he had a job to come back to. The Board found this was clearly not an unconditional offer to come back to work.

does not change the fact that the initial offer was conditional and that Barth never took any action to convert the conditional offer made on his behalf as a member of the group to an unconditional, individual offer. Cf. Sawyer Shoes, Inc., supra. Accordingly, Barth failed to satisfy a necessary condition precedent to his reinstatement and Containair is therefore not legally compelled to offer him reinstatement.

Furthermore, and in any event, in its letter of March 15, Containair's counsel directed Local 295, Barth's designated representative (A. 49), to have Barth, among others, report to Containair at the start of business on March 18 when it would finally tell him his job status. Barth never reported in any way. In early April, the Company permanently replaced Barth. In these circumstances, Barth must be held to have waived or abandoned any right to reinstatement he might have had. Fox & Ginn Moving & Storage Co., 146 NLRB 707, 712 (1964) (Charles Sawyer); S. D. Cohoon & Son, 101 NLRB 966 (1952).

The Board's conclusion that "Barth had previously been personally refused reinstatement" and that "[i]n the absence of some personal notification from Respondent that the situation had changed, he was not required to engage in what would appear to be a completely futile act" (A. 15) is without merit. Containair did not flatly refuse to reinstate Barth. Estrada merely told Barth that he could not put him back to work at that time because Containair was investigating a few

incidents involving him and that he would be informed of the outcome of the investigation (A. 151-152, 165). Later that day Containair's counsel sent Local 295 the letter (A. 48-49) instructing the Union to have Barth report on March 18 when he would be told of his individual job status. Inasmuch as Containair had not previously ruled out the possibility that it might reinstate Barth, Barth's reporting to Containair as directed cannot be regarded as a "futile act". Indeed the only reasonable conclusion must be that Barth, by his failure to report prior to the Company's hiring a permanent replacement, waived any right to reinstatement he may otherwise have had.

CONCLUSION

For the reasons stated, the Board's order ought to be set aside and its petition for enforcement denied in all respects.

Respectfully submitted,

KELLEY DRYE & WARREN
Attorneys for the Respondent
350 Park Avenue
New York, New York 10022
212 - 752-5800

Of Counsel:

Eugene T. D'Ablemont
John F. Gibbons
Diana B. Winston

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
NATIONAL LABOR RELATIONS BOARD, :
:
Petitioner, : AFFIDAVIT
: OF SERVICE
- against - : BY MAIL
:
CONTAINAIR SYSTEMS CORPORATION, : Index No.
: 76-4038
:
Respondent. :
:
:
:
-----X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DONNA GIGLIO , being duly sworn,
deposes and says that she is over the age of eighteen years,
that she resides at 64-33 Cooper Avenue, Glendale, New York
11227 , and that she is not a party to the above
entitled appeal .

That on the 18th day of August , 1976, she
served the annexed Brief
on the attorney(s) hereinafter named by depositing ^{three} ~~(s)~~/true
copy (ies) thereof contained in (a) securely sealed, post-
paid wrapper(s), properly addressed to the said attorney(s)
as follows:

Elliott Moore, Esq.
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

in the letter box regularly maintained and exclusively
controlled by the United States Government at No. 350 Park
Avenue, Borough of Manhattan, New York, New York 10022.

Donna Shagie

Sworn to before me this
18th day of August, 1976.

Joseph Warren

JOSEPH WARREN
Notary Public, State of New York
No. 03-9539130
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1978